

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.97 OF 1986

Dharmanna Kashiraya Karajgi,)
since deceased by his legal)
representatives:)
1(a) Smt.Putalabai w/d.Dharmanna Karajgi,)
1(b) Abha Sidhana s/o.Dharmanna Karajgi,)
1(c) Shrikant s/o.Dharmanna Karajgi,)
1(d) Smt.Annapurna Gulingvva Sarkar,)
1(e) Smt.Mahadevi Gulingppa Kashbalur,)
1(f) Smt.Shantabai Mailari Kulburge,)
1(g) Smt.Rakmabai Bhimanna Savkar,)
1(h) Shri Ramchandra Katti,)
1(i) Smt.Phalitabai Shivasharam Rautigale,)
1(j) Smt.Shashikala Kashinath Birdor.)Appellants

Vs.

Shivlingavva w/o Chanbasappa)
Mayanale & Ors.)Respondents

Shri P.N. Karlekar for the Appellants.
Shri P.M. Mengane for the Respondent No.1.

CORAM : ABHAY S. OKA, J.

DATE : AUGUST 19, 2006.

JUDGMENT:

1. This Court admitted the Second Appeal on 24th February, 1986 by framing the following substantial question of law:

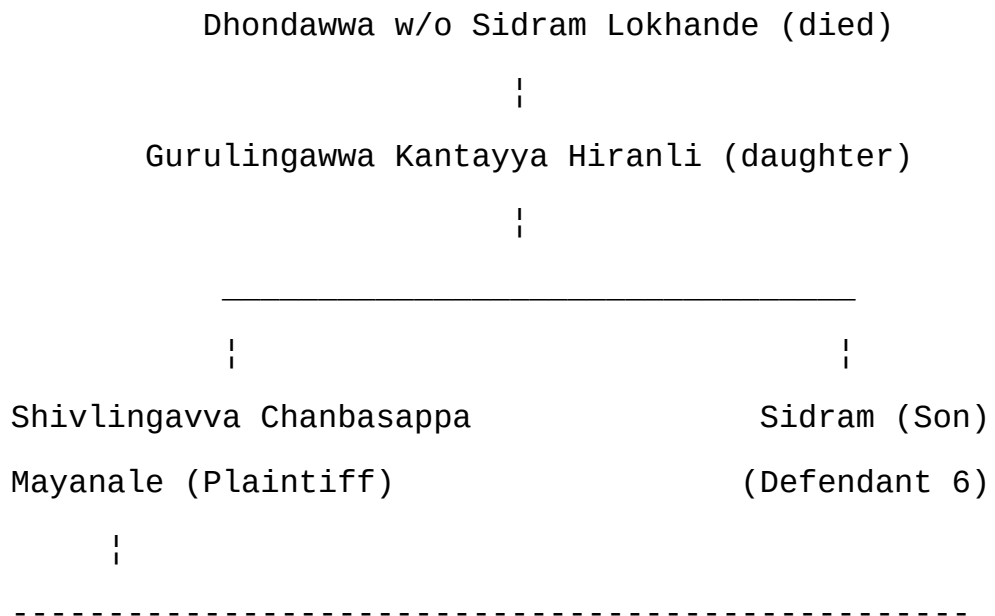
(i) Whether the Plaintiff has any right or any claim to property sold by testator before her death?

2. I have heard Shri Karlekar, the learned

counsel appearing for the Appellant and Shri Mengane, the learned counsel appearing for the Respondent No.1 in the Appeal as well as in the cross-objection which is filed by the first Respondent.

3. The Appellant is the seventh Defendant and the first Respondent is the Plaintiff. For the sake of convenience the parties are hereinafter referred to with reference to their respective status in the Trial Court. With a view to appreciate the submissions which are made by the learned Counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief.

4. The relevant genealogy is as under:



Basavanappa	Gurusidappa	Shrimant	Shivappa	Sharanappa
Son	Son	Son	Son	Son
Deft.1	Deft.2	Deft.3	Deft.4	Deft.5

5. There is no dispute that the suit properties namely lands and houses described in paragraph No.1(a) to 1(f) of the plaint were admittedly owned by the deceased Dhondawwa. The said Dhondawwa died on 18th March, 1978. The said Dhondawwa, as is seen from the genealogy, was survived by her daughter Gurulingawwa. The said Gurulingawwa had a son by the name Sidram (Defendant No.6) and daughter Shivlingavva. First to fifth Defendants are the sons of Shivlingavva. The suit was filed by Shivlingavva w/o Chanbasappa Maynale who claims to be the owner of all the properties on the basis of a Will. The case of the Plaintiff is that deceased Dhondawwa executed a Will dated 28th December, 1958 in favour of the Defendant No.6 Sidram. However, the said Will was revoked by the said Dhondawwa by her subsequent Will made on 06th January, 1965. By the said Will, she made a bequest of all the suit properties in favour of the Plaintiff. According to the case of the Plaintiff, Dhondawwa had appointed her as her constituent attorney to look after the

properties. According to the case of the Plaintiff till 18th March, 1978 i.e. the date of death of Dhondawwa, she looked after and managed the suit properties and from that date she became owner of the suit properties on the basis of Will dated 06th January, 1965.

6. In the plaint it is alleged that the first, sixth and seventh Defendants in October 1971 started obstructing the Plaintiff over her alleged peaceful possession of the suit properties and especially the suit lands. According to the Plaintiff, the said Defendants went to eight and ninth Defendants who were the tenants in the suit house and started receiving rent from the said tenants. The said Defendants disclosed to the Plaintiff that the first to fifth Defendants under a Sale Deed dated 18th July, 1968 have purchased property mentioned in paragraph Nos.1a, 1d and 1f of the plaint. The Plaintiff learned that the sixth Defendant purchased the property mentioned in paragraph No.1b, 1c and 1e by a registered Sale Deed dated 11th July, 1968. The Plaintiff learned that the first Defendant by posing himself as the constituted attorney of Dhondawwa sold the properties mentioned in paragraph Nos.1a and 1d of the plaint by a registered Sale Deed dated 19th February, 1970 for a

consideration of Rs.12,000/- in favour of the seventh Defendant who is the Appellant in this second Appeal.

7. The case in the suit filed by the Plaintiff is that the Sale Deeds which were executed in favour of the first to seventh Defendants are void ab initio and not binding on her. The suit was filed on the basis of ownership which the Plaintiff allegedly acquired on the basis of Will dated 06th January, 1965. The Plaintiff claimed a decree for possession and mense profit. The first Defendant remained absent and did not appear in the suit. However, he was appointed as the guardian of the second to fourth Respondents who were minors at that time. The Appellant-seventh Defendant filed written statement for resisting the suit. He also filed additional written statement. The seventh Defendant denied that the Plaintiff had become the owner of the entire suit property on the basis of Will dated 06th January, 1965. He denied that the earlier Will dated 28th December, 1958 was revoked by Dhondawwa. The seventh Defendant contended that the property described in paragraph Nos.1a and 1d of the plaint has been purchased by him for valuable consideration of Rs.12,000/- and that he is in possession from date of execution of the Sale Deed.

8. The learned Trial Judge decreed the suit by holding that the Plaintiff and the sixth Defendant were having one half undivided shares in the suit property. Therefore, a preliminary decree for partition was passed in favour of the Plaintiff. It was held that the Sale Deeds dated 11th July, 1968 and 19th February, 1970 were not binding on the Plaintiff. The learned Trial Judge held that the deceased Dhondawwa has executed a general power of attorney in favour of the Plaintiff. The learned Trial Judge accepted the case made out by the Plaintiff as regards cancellation of earlier Will made by Dhondawwa and execution of Will dated 06th January, 1965 in favour of the Plaintiff. The learned Trial Judge held that the sixth and seventh Defendants have failed to establish that deceased Dhondawwa had executed a power of attorney in favour of the first Defendant authorising and empowering him to execute sale transactions in respect of the suit properties.

9. There were two Appeals preferred before the District Court against the decree passed by the Trial Court. One Appeal was preferred by the original Plaintiff and the other by the seventh Defendant who is the Appellant herein. Both the Appeals were dismissed by the learned 2nd Additional District

Judge. The learned Appellate Court held that the power of attorney allegedly executed by Dhondawwa in favour of the first Defendant was not duly proved. The first Appellate Court also observed that in view of the provisions of section 17 of the Indian Registration Act, 1908, the power of attorney was required to be registered as the recitals in the power of attorney show that interest was created in favour of the first Defendant. The first Appellate Court held that as the power of attorney was not registered, it cannot give authority to the first Defendant to transfer the property of deceased Dhondawwa. The learned Judge held that even the Sale Deed allegedly executed by the first Defendant in favour of the seventh Defendant was suspicious as there was no evidence to show that earnest money of Rs.7,000/- was paid by the seventh Defendant before the execution of the Sale Deed.

10. Shri Karlekar, the learned counsel appearing for the Appellant-seventh Defendant submitted that the power of attorney at Exhibit 127 by Dhondawwa in favour of the first Defendant was executed before the Judicial Magistrate. He submitted that there is a presumption in favour of the execution of power of attorney. He submitted that as the power of attorney

was duly proved, it was obvious that the first Defendant had authority to execute Sale Deed in respect of the property of deceased Dhondawwa. He submitted that the power of attorney will not require registration and the courts below have committed an error by holding that the document required compulsory registration under section 17 of the said Act of 1908. Shri Mengane, the learned counsel appearing for the Respondent No.1-original Plaintiff submitted that the power of attorney was not at all proved. He submitted that no witness to the execution of the power of attorney was examined and witness Khalifa who was examined admitted that he had not obtained thumb impression of deceased Dhondawwa on the power of attorney. He submitted that the execution of the power of attorney and contents thereof were not at all proved by the seventh Defendant and therefore, the Sale Deed executed in his favour was rightly held as not binding on the Plaintiff. He submitted that the entire basis of the case of the seventh Defendant is the power of attorney, the execution and contents of which are not duly proved. He placed reliance on decision of the learned single Judge of this court in the case of Mohansheth Purushottam Gujar Vs. Jayashri Vasantrao Mahagaonkar (AIR 1979 Bombay 202). He submitted that in view of the said decision, the

presumption under section 85 of the Indian Evidence Act, 1872 cannot be relied upon. He, therefore, submitted that no interference is needed.

11. I have carefully considered the submissions. So far as the claim of the Plaintiff based on Will is concerned, the controversy relating to the said claim does not arise in this Appeal. If it is established that deceased Dhondawwa had executed a power of attorney in favour of the first Defendant, then it is obvious that the Sale Deed which was executed by the first Defendant in favour of the seventh Defendant-Appellant during the lifetime of Dhondawwa will be valid. Therefore, even assuming that there is a Will in favour of the original Plaintiff, the property sold to the seventh Defendant will not be affected by the Will as the bequest will operate only to those properties which are not disposed of by the deceased Dhondawwa before her death. Therefore, the first issue which will have to be decided is as regards execution of power of attorney which is at Exhibit 127. The first Defendant is the son of grand-daughter of Dhondawwa. On plain reading of the power of attorney it is crystal clear that power of attorney was not executed for consideration. The courts below were impressed by the argument that power

of attorney requires compulsory registration. On plain reading of the power of attorney which is produced at Exhibit 127, it is apparent that the power of attorney does not create or transfer any right, title and interest in any immovable property held by deceased Dhondawwa. It is surprising that the courts below have held that section 17(1)(b) of the said Act of 1908 will apply to power of attorney and therefore, power of attorney requires registration. It is obvious that the power of attorney did not require registration.

12. The learned Trial Judge has observed and it is apparent from document at Exhibit 127 that the power of attorney is executed before the learned Judicial Magistrate, First Class, Akkalkot. It is noted in the judgment of the Trial Court that stamps on which power of attorney is executed were purchased in the name of Dhondawwa on the same day. The learned Magistrate has signed and sealed the power of attorney. In this connection, it will be necessary to refer to the relevant provisions of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act). Section 85 of the Evidence Act reads thus:

"85. Presumption as to powers-of-attorney.- The Court shall presume

that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, (Indian) Consul or Vice-Consul, or representative of the (Central Government), was so executed and authenticated."

On plain reading of section 85 of Evidence Act, there is a presumption that every document purporting to be a power of attorney and to have been executed and authenticated by a Court, Judge or Magistrate was so executed and authenticated. Shri Mengane, learned Counsel appearing for the original Plaintiff placed reliance on the decision of the learned single Judge in the case of Mohanshet Purushottam Gujar (Supra). The learned single Judge has considered the question of applicability of section 85 of the Evidence Act to power of attorney which is executed before an officer who is named in the said section. In paragraph No.10 of the said decision, the learned single Judge of this court has held thus:

"For the purpose of such presumption to operate, particularly in the background of the facts above ascertained, the

authentication must be clear, specific, more decisive and bereft of the features which I have indicated earlier. If there is the slightest doubt, then the Court must be loathe to rely on the presumption contained in S.85 and must be equally loathe in applying such presumption in favour of the party relying on the document. In my opinion this was a case in which the presumption under S.85 should not have been raised in favour of the respondent."

The above observation makes it very clear that the learned single Judge was considering the question of applying presumption under section 85 of the Evidence Act in the background of the facts of the case before him. After considering the facts of the case, he observed that authentication of power of attorney must be clear, specific and more decisive. Moreover, the learned single Judge has made it very clear that according to his opinion the case before him was one in which presumption under section 85 of the Evidence Act should not have been raised in favour of the Respondent.

13. In the present case, we are dealing with a

power of attorney which is executed and authenticated before the learned Judicial Magistrate. The learned Trial Judge has observed that mere proof of execution of power of attorney is not sufficient. The learned Trial Judge proceeded to observe further that it must be proved beyond all doubts that it was executed voluntarily and with free Will. The learned Judge, found fault with the witness Khalifa examined by the seventh Defendant who stated that she had not obtained thumb impression of Dhondawwa on Exhibit 127.

14. Turning to the judgment of the Appellate Court it is held that the power of attorney was a compulsory registrable document. It must be remembered it is not the case made out in both the courts below on evidence that the said Dhondawwa had not executed the power of attorney voluntarily and with free Will. If these are the facts which are borne out by the record, it is difficult to understand as to how presumption under section 85 of Evidence Act will not apply to the power of attorney at Exhibit 127. The Appellate Court has laid much emphasis on non-registration of the power of attorney. The said observation of the Appellate Court is completely contrary to section 17 of the said Act of 1908.

15. Thus, only conclusion which can be drawn is that there was a power of attorney executed by deceased Dhondawwa before the Judicial Magistrate First Class as the presumption under section 85 of the Evidence Act will squarely apply.

16. The courts below were impressed by the fact that evidence could not be led to show that sum of Rs.01,000/- was paid by the seventh Defendant to first Defendant in presence of Sub-Registrar. The Trial Court has observed that it was for the seventh Defendant to examine the first Defendant as a witness to the Sale Deed. This court has deprecated the practice of calling a party to the suit as a witness by other party. The other crucial aspect is that the first Defendant did not appear in the suit and in fact the contention of the seventh Defendant was that the suit has been filed in collusion with the first Defendant. The Sale Deed executed by the first Defendant is a registered document. The courts below have not observed or held that execution of the said document by the first Defendant is not proved. All that the Trial Court has observed in paragraph No.47 is that in absence of evidence of the first Defendant the transaction reflected in the Sale Deed cannot be treated as real transaction. In my view, the courts

below have committed an error by coming to the conclusion that it was not a real transaction. Once the power of attorney executed by Dhondawwa in favour of the first Defendant was established, it is obvious that the first Defendant had right to sell the property of Dhondawwa as is clear from the recitals of the power of attorney at Exhibit 127. The first Defendant has not made any grievance regards alleged non payment of the complete consideration under the document. Thus, the sum and substance of the discussion is that the courts below ought to have given effect to the documents at Exhibits 127 and 129 which clearly prove the transfer of part of the suit properties by the first Defendant in favour of the Plaintiff. The courts below have not drawn proper inferences which were very obvious from the recitals in the documents at Exhibits 127 and 129 which were duly proved in evidence. It must be noted here that it is not the case of the Plaintiff that any fraud or misrepresentation was practised by the seventh Defendant. Thus, the declaration which is granted by the Trial Court as regards Sale Deed dated 19th February, 1970 cannot be sustained and that part of the decree will have to be modified.

17. Rest of the decree passed by the Trial Court

will have to be maintained with a modification that the property which is subject matter of Sale Deed dated 19th February, 1970 will not be available for partition.

18. Hence, I pass the following order:

- (i) The following operative part of the decree passed by the Trial Court "It is hereby declared that Sale Deeds dated 11th July, 1968 and 19th February, 1970 are not binding on the Plaintiff or the suit properties" is substituted as under:

"It is hereby declared that the Sale Deed dated 11th July, 1968 is not binding on the Plaintiff or the suit properties."

- (ii) It is clarified that as the Sale Deed dated 19th February, 1970 is held to be valid, neither the Plaintiff nor the Defendant No.6 will have any share in the property described in the said Sale Deed and therefore, the property subject matter of the said Sale Deed will not be available for partition.

(iii) Rest of the decree is confirmed.

(iv) The Appeal is partly allowed in above terms
with no order as to costs.

JUDGE